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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: QuanTech, Inc.--Costs

File: B-291226.3

Date: March 17, 2003

Roy Goldberg, Esq., Sheppard, Mullin, Richter & Hampton, for the protester.
Richard S. Brown, Esq., Department of Commerce, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office declines to recommend that protester be reimbursed its protest costs where the agency promptly took corrective action in response to a supplemental protest.

DECISION

QuanTech, Inc. requests that our Office recommend that the firm be reimbursed the reasonable costs of filing and pursuing its protest of an award to ORC Macro International under request for proposals (RFP) No. 52-DGNF-2-9007, issued by the Department of Commerce, National Oceanic and Atmospheric Administration, for the intercept portion of the Marine Recreational Fishery Statistics Survey.

We deny the request.

The solicitation contemplated the award of a contract for the intercept portion of the 2002 to 2005 Marine Recreational Fishery Statistics Survey to be conducted at marine fishing access points to collect individual catch data, including exact species, total number of each species, and length and weight measurements. To assist in this effort, the agency relies on state participation, often in the form of state subcontracts with the intercept contractor under which the states use their own resources to conduct intercept surveys. Award was to be made on a "best value" basis, considering price, technical and past performance factors.

After the agency received proposals and heard oral presentations in response to the solicitation, the agency evaluated the proposals, conducted discussions, and

obtained revised final proposals from Macro and QuanTech. Macro was selected for award.

In its initial protest of the award, filed September 3, 2002, QuanTech primarily alleged that the agency essentially abdicated its role as source selection authority and allowed certain states, which had inherent conflicts of interest, to control the award selection. The protester also argued that the agency improperly evaluated past performance and the proposed management approach, and alleged that the agency failed to hold meaningful discussions in certain areas where QuanTech's proposal was downgraded.

In response, the agency filed a report on October 8 that responded to the protester's allegations.

Based on its review of the agency report, the protester filed a timely supplemental protest on October 18, contending, among other things, that the chairperson of the Technical Evaluation Committee (TEC) had an individual conflict of interest. Specifically, the protester maintained that this person had, during the time period that proposals were evaluated, left government employment and assumed a job with an outside organization which was directly interested in this procurement, while still maintaining her position on the TEC.

On October 21, the protester filed comments that responded to the agency's report, in which the protester for the first time detailed specific instances where it found the discussions to be inadequate.

On November 4, the agency advised our Office and the protester that it intended to take corrective action in response to QuanTech's supplemental protest. Specifically, the agency said that it would reconstitute the TEC, without the member that was alleged to have the conflict, and reevaluate proposals, and that it would reopen negotiations, if the TEC determined that such action was warranted.

Our Office dismissed the protests as academic on November 7. On November 19, QuanTech filed its request that it be reimbursed its protest costs because the agency had assertedly unduly delayed in taking corrective action on QuanTech's clearly meritorious protest.

Meanwhile, the agency reconstituted a new TEC, minus the allegedly conflicted evaluator, to reevaluate the proposals. Based on this reevaluation, the agency decided to reopen discussions. On December 20, QuanTech was sent 29 questions to respond to.

On January 3, 2003, QuanTech supplemented its request that it be reimbursed its protest costs, asserting that these questions demonstrated that its initial protest, alleging a lack of meaningful discussions, was clearly meritorious and that this corrective action, responding to that protest, was unduly delayed.

Since QuanTech filed its prior protest, there has been no performance under this protested contract. However, the agency advises that it has been noncompetitively obtaining some services that would have been covered by this procurement from Macro, apparently under that firm's incumbent contract.

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the agency pay the protester the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2003). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 5. The promptness of the agency's actions is measured relative to the time when the protester identifies the issue that prompts the corrective action. Where, as here, a protester introduces different issues in multiple submissions to our Office, the promptness of the agency's corrective action is not measured from the protester's initial protest, if that protest did not identify the issue on which the agency based its corrective action. J.A. Jones Mgmt. Servs., Inc.--Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3.

As explained above, QuanTech's initial protest concerned, among other things, an alleged conflict of interest on the part of several states that improperly affected the award selection, and the agency's alleged failure to conduct meaningful discussions. It was only in QuanTech's supplemental protest that the allegation of a personal conflict of interest on the part of the chairperson of the TEC was raised. In response to this protest, the agency took corrective action on November 4, 2002, just over 2 weeks after the supplemental protest was filed, and on the date that the report on the supplemental protest was due. As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard the action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. Id. at 4. While QuanTech argues that the agency should have realized that this was a problem before QuanTech filed its supplemental protest, as noted above, we measure the promptness of an agency's corrective action from when the protester first raised the issue. Id.

In its January 3, 2003 submission, QuanTech maintained that the agency, by virtue of asking questions in areas where QuanTech specifically asserted no meaningful discussions had been conducted previously, has taken unduly delayed corrective action in response to QuanTech's initial protest, filed September 3, 2002, which alleged, among other things, that the agency failed to conduct meaningful discussions. The agency responds that its corrective action responsive to

QuanTech's protest was appointing the new TEC, and that the new TEC decided to reopen discussions primarily because QuanTech's proposal had changed significantly since it was first submitted, and that the TEC only asked the questions, which QuanTech now points to as corrective action in response to its initial protest, "in an abundance of caution, to avoid these becoming issues at a later time," even though they involved matters that the agency did not consider significant to the award decision.

The agency's explanation as to why it asked these questions seems reasonable and within its discretion. However, even assuming these discussions constituted "corrective action," this would not mean that QuanTech's costs should be reimbursed; the corrective action must have been in response to a "clearly meritorious" protest, *i.e.*, not a close question. Baine Clark, B-290675.3, Sept. 23, 2002, 2002 CPD ¶ 166 at 2; see Libby Corp.—Costs, B-258089.7, Dec. 13, 1995, 95-2 CPD ¶ 257 at 4. We do not consider QuanTech's protest contention that meaningful discussions were not conducted to be clearly meritorious. As indicated in the agency report, the agency previously conducted discussions in the general areas in which QuanTech alleged meaningful discussions were not conducted. While the protester asserted, in its comments on the agency report, that the agency should have been much more specific in its discussion questions—with specific questions asked concerning every evaluated weakness in, or concern regarding, QuanTech's proposal—an agency, to satisfy the requirement for meaningful discussions, need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. ITT Fed. Sys. Intl. Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7. Based on our review, it appears that it could be reasonably argued that the previous discussions conducted with QuanTech were sufficient to lead QuanTech into the general areas of its proposal requiring amplification or revision, and that QuanTech's protest of this matter was therefore not clearly meritorious.

Finally, the protester asserts that we should look at the agency's "evasion" of the requirement that performance of the improperly awarded contract was to be stayed in deciding whether to recommend payment of protest costs. As noted above, although there has been no performance under the protested contract, the agency is apparently acquiring some of the solicited services from Macro under another contractual vehicle. However, the protester has not protested this action by the agency. In any event, we do not believe that how the agency is currently acquiring these services creates a basis to recommend the payment of costs.

The request for a recommendation that costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel